No. 8797

United States
Circuit Court of Appeals

UNITED STATES OF AMERICA, HAROLD L. ICKES, Secretary of the Interior, Henry Gerharz, Project Engineer of the Flathead Irrigation Project, et al.,

Appellants,

vs.

AGNES McINTIRE, ALEX PABLO and A. M. STERLING,

Appellees.

FLATHEAD IRRIGATION DISTRICT, a corporation,

Appellant,

vs.

AGNES McINTIRE, ALEX PABLO and A. M. STERLING,

Appellees.

Brief of Appellee
AGNES McINTIRE

Elmer E. Hershey,
Attorney for Appellee.

Upon Appeals from the District Court of the United States for the District of Montana.

Filed .....

Clerk .....

United States
Circuit Court of Appeals

UNITED STATES OF AMERICA, HAROLD L. ICKES, Secretary of the Interior, Henry Gerharz, Project Engineer of the Flathead Irrigation Project, et al.,

Appellants,

vs.

AGNES McINTIRE, ALEX PABLO and A. M. STERLING,

Appellees.

FLATHEAD IRRIGATION DISTRICT, a corporation,

Appellant,

vs.

AGNES McINTIRE, ALEX PABLO and A. M. STERLING,

Appellees.

Brief of Appellee

AGNES McINTIRE

Elmer E. Hershey,
Attorney for Appellee.

Upon Appeals from the District Court of the United States for the District of Montana.

—INDEX—

BRIEF FOR AGNES McINTIRE, PLAINTIFF AND APPELLEE

STATEMENT OF THE CASE

July 16, 1855 (12 Stat., 975), a treaty was made by the United States of America, one of the defendants herein, with the chiefs, headmen and delegates of the confederated tribes of the Flathead, Kootenay and Upper Pend d'Oreilles Indians on behalf and acting for said confederated tribes, whereby said confederated tribes ceded, relinquished, and conveyed to the United States all their rights, title, and interest in and to the country occupied or claimed by them, and particularly described.

There was reserved from the lands ceded, for the use and occupation of the confederated tribes entering into said Treaty, certain lands which were thereafter to be known as the Flathead Indian Reservation, with certain exclusive rights reserved to said Indians.

The Indians of said confederated tribes were encouraged to abandon their habits as a nomadic and uncivilized people and become self-supporting, agricultural, and civilized people, with permanent homes on lands thereafterwards allotted to them in severalty.

April 23, 1904 (33 Stat., 302), an Act of Congress provided for the survey and allottment of lands then embraced within the limits of the Flathead Indian Reservation.

On June 21, 1906 (34 Stat., 354), there was added by Congress of the United States to the provisions of the Act approved April 23, 1904, providing for the allott-

ment of said lands and the opening of the same for sale and disposal, Sections 17, 18, 19, and 20, Section 19 being as follows:

> "Sec. 19. That nothing in this act shall be construed to deprive any of said Indians, or said persons or corporations to whom the use of land is granted by the act, of the use of water appropriated and used by them for the necessary irrigation of their lands or for domestic use or any ditches, dams, flumes, reservoirs, constructed and used by them in the appropriation and use of said water."

Michel Pablo, an Indian, took possession of a large tract of land, and prior to 1891 (R 242) dug and constructed a large ditch from Mud Creek, a mile long, three feet wide at the bottom and about two fee deep (R 240), and carried the water to the lands in his possession, which he had fenced, and used the same in irrigating said lands and for domestic purposes.

Eighty (80) acres of this land, covered by said ditch, was allotted to Lizette Barnaby and 80 acres was allotted to Michel Pablo, and trust patents were issued to these parties for the lands so allotted, in 1908.

On October 5, 1916, a fee patent was issued to Agatha Pablo for the lands allotted to Lizette Barnaby (R 234), and on January 25, 1918, a fee patent was issued to Agatha Pablo to the land allotted to Michel Pablo (R 232).

Thereafter, by deeds, duly given, plaintiff became the owner of these lands (R 236-237-238-239).

Michel Pablo died in 1914 (R 316).

These lands are arid lands, and require water for the

proper irrigation of the same, and in order to raise crops.

August 26, 1926, the Flathead Irrigation District was created, under certain Acts of Congress (R 123-124).

About 1914, what is known as the Pablo Feeder Canal was built (R 264).

In building this Canal,

> "instructions were to find the best way to use all the water available on that project without regard to any of the rights that might have existed." (R 257).

The Pablo Feeder Canal crosses Mud Creek above the lands owned by plaintiff (R 257) and carries the waters to irrigate lands that never had any water on them before the Canal was built, and a great portion of these lands were unallotted lands, and were entered by white settlers under the Homestead Law (R 327).

No water from the Flathead Irrigation Project System has been used upon the lands of plaintiff, and no ditches have ever been dug making the water available for the irrigation of these lands (R 263-264).

The United States Reclamation Service was in charge of the Flathead Irrigation Project up to 1924, when the same was turned over to the control of the Indian Service (R 264).

In 1924, plaintiff obtained possession of the lands now owned by her, and the same has been irrigated to some extent each year since (R 244-336-337).

The west eighty is within the irrigation district, but the east or Barnaby eighty is not in the irrigation district (R 264).

Plaintiff, for a time, was not charged with any water from the Reclamation Service, but since the defendant Gerharz came in as Project Manager, plaintiff has been paying the water tax from the Reclamation Service, which water has never been furnished, in order to pay her property tax in the County and State (R 339), under the provisions of Sec. 2172.1, R. C. of Montana.

This action was commenced February 13, 1934 (R 9) and was finally tried on the second Amended Complaint, filed May 16, 1936, with the United States of America, Harold L. Ickes, Secretary of Interior, Henry Gerharz, Project Manager of the Flathead Irrigation Project, Flathead Irrigation District, and 37 others, defendants.

On November 23, 1936, 19 members of the Flathead Tribe of Indians, and wards of the United States of America, defendants above named, through United States District Attorney, for the District of Montana, filed their answer to the Amended Bill of Complaint (R 118), and the other 18 defendants made no appearance.

On September 15, 1937, the decision of the Court was duly filed in said case (R 159 to 176).

Findings of Fact and Conclusions of Law were adopted and signed by the Court on November 6, 1937 (R 209 to 214).

On November 17, 1937, a Decree in this case was given by the Court and filed (R 225-226).

ARGUMENT

It must be remembered that by the treaty of July 16, 1855, the United States granted nothing to the Indians; the Indians reserved what was already theirs.

As said by the Court in Winters vs. United States 143 Fed. 740, 749

> "In conclusion, we are of the opinion that the Court below did not err in holding that 'When the Indians made the treaty to grant rights to the United States, they reserved the rights to use the waters of Milk River at least to an extent necessary to irrigate their lands.' The right so reserved continues to exist against the United States and its grantees as well as against the State and its grantees."

And again we find the Court holding in Skeem vs. United States 273 Fed. 93, 95

> "The grant was not a grant to the Indians, but was a grant from the Indians to the United States, and such being the case all rights not specifically granted were reserved to the Indians. United States v. Winans, 198 U.S. 371, 25 Sup. Ct. 662, 49 L. ed. 1089; Winters v. United States, 207 U.S. 564, 28 Sup. Ct. 207, 52 L. Ed. 350."

Judge Cavanah, District Judge said in United States vs. Hibner 27 Fed. (2d) 909, 911

> "When considering the nature of the grant under consideration, we must not forget that it was not a grant to the Indians, but was one from them to the United States, and all rights not specifically granted were reserved to them. Winters v. U.S. and U.S. v. Winans, supra."

Further, Judge Cavanah said:

> "The right of the Indians to occupy, use, and sell both their lands and water is now recognized, as

> this view is sustained in the case of Skeem v. U.S., supra, and such being the case, a purchaser of such land and water right acquires, as under other sales, the title and rights held by the Indians and that there should be awarded to such purchaser the same character of water right with equal priority as those of the Indians."

In building the Pablo Feeder Canal, the provisions of the Act of Congress under which it was constructed were violated at the beginning.

> "Instructions were to find the best way to use all the water available on that project, without regard to any of the rights that might have existed." (R 257)

Also, in building said Pablo Feeder Canal, Section 19, amending the Act for the survey and allottment of lands embraced within the limits of the Flathead Indian Reservation, approved April 23, 1904, (33 Stat., 302), was disregarded.

This Amendment was approved June 21, 1906 (34 Stat., 354) and is as follows:

> "Sec. 19. That nothing in this Act shall be construed to deprive any of said Indians, or said persons or corporations to whom the use of land is granted by the act, of the use of water appropriated and used by them for the necessary irrigation of their lands or for domestic use, or any ditches, dams, flumes, reservoirs, constructed and used by them in the appropriation and use of said water."

Michel Pablo was dead when the Pablo Feeder Canal was constructed.

VESTED RIGHTS ACQUIRED BY PLAINTIFF

The ditch carrying water to the lands of Michel Pablo was dug and the water used on the lands in his pos-

session in the irrigation of the same long prior to 1908 when the Trust Patents were issued to said Indians for the lands now owned by plaintiff.

The Act of July 26, 1866 (14 Stat., 253) provides as follows:

> "Sec. 2339. Whenever priority of possession, rights to the use of water for mining, agriculture, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowleged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same:***

This is Section 2339 of the United States Compiled Statutes, 1901.

Section 2340 following, is as follows:

> "Sec. 2340. All patents granted, pro-emption or homesteads allowed shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights as may have been acquired under or recognized by the preceding section."

The fee patents of October 5, 1916 and January 25, 1918, gave and granted the lands,

> "together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging unto the said claimant and to the heirs and assigns of said claimant forever." (R 232-234).

When the patents issued in this case, they took effect as of the date when the right to the land was first initiated under the doctrine of relation.

U.S. vs. Hibner, supra, at page 912.

In the case of Hooks, et al, v. Kennard, et al, 114 Pac. on page 746, the Court said:

> "This Court has held in several cases that the selection of and the filing upon an allottment of land was the inception and beginning of the title of the allottees or his heirs, and that, when the patent which is only the evidence of title is issued, it relates back to the inception of the title. De Graffenreid v. Iowa Land & T. Co., 20 Okl. 687, 95 Pac. 624; Godfrey v. Iowa Land & Title Co., 21 Okl. 293, 95 Pac. 792; Irving, et al, v. Diamond, 23 Okl. 325, 100 Pac. 557."

To the same effect is the case of Wood, County Treasurer, et al, v. Gleason, et al, 140 Pac. ~~481~~ 418.

Plaintiff became the owner of the right to use the waters of Mud Creek for the irrigation of the 160 acres described in her Complaint. Beneficial use is the basis, the measure, and the limit of the right. This right is a vested property right, and dates from a time prior to 1891.

If there were any other owners to the right to use the waters of Mud Creek for a beneficial purpose, such rights would be a joint right with plaintiff, and the users thereof would be tenants in common, or joint tenants in the use of said water, and the United States of America, Harold L. Ickes, Secretary of Interior, Henry Gerharz, Project Manager of the Flathead Irrigation Project, Flathead Irrigation District, and 37 others were made defendants in order that any rights of said defendants, adverse to the claim of plaintiff, might be established, fixed, and determined.

Alex Pablo and A. M. Sterling were the *only defend-*

ants who set forth and established any claim to the beneficial use of the waters of Mud Creek.

The United States of America must either claim *with* plaintiff as a joint owner or joint tenant in the beneficial use of the waters of Mud Creek or it has no interest in said waters.

> "Federal government's diversion, storage and distribution of water, at Reclamation Project, pursuant to Reclamation Act and contracts with landowners *held* not to have vested in the United States ownership of water rights which remained vested in owners as appurtenant to land wholly distinct from property of government in irrigation work." Ickes, Secretary of Interior, v. Fox et al, 57 Supreme Court Reporter, page 412.

If the United States of America is not the owner, such as would make it a joint tenant or tenant in common, then the United States is not necessarily a party, and as said in said case, Ickes v. Fox, supra, p. 417,

> "the suits do not seek specific performance of any contract. They are brought to enjoin the Secretary of Interior from enforcing an Order, the wrongful effect of which will be to deprive respondents of vested property rights, not only acquired under Congressional acts, state laws and government contracts, but settled and determined by his predecessor in office. That such suits may be maintained without the presence of the United States has been established by many decisions of this Court."

And citing many authorities, and continuing, said:

> "The recognized rule is made clear by what is said in the Simpson case: 'The suit rests upon the charge of abuse of power.' "

It is clearly shown, by the evidence offered, that

long prior to the passage of the Act for the survey and allottment of lands embraced within the limits of the Flathead Indian Reservation, and long prior to the commencement of any work of the Flathead Irrigation Project, and long prior to the creation of the Flathead Irrigation District, the waters of Mud Creek were being used upon land of plaintiff for irrigation purposes, and in 1908, when the lands were allotted to the Indian claimants, if not before, said water became appurtenant to the lands so allotted.

As was said by the Court in Choate vs. Trapp. Vol. 32, Supreme Court Reporter, at page 568,

> "there is a broad distinction between tribal property and private property, and between the power to abrogate a statute and the authority to destroy rights acquired under such law. Reichart v. Felps, 6 Wall. 160 18 L. ed. 849. The question in this case, therefore, is not whether the plaintiffs were parties to the Atoka agreement, but whether they had not acquired rights under the Curtis act which are now protected by the Constitution of the United States."

Also the Court in this case, on page 570, said,

> "There have been comparatively few cases which discuss the legislative power over private property held by the Indians. But those few all recognize that he is not excepted from the protection guaranteed by the Constitution. His private rights are secured and enforced to the same extent and in the same way as other residents or citizens of the United States."

It would seem that Congress, in amending the Act providing for the allottment of lands upon the Flathead Indian Reservation, had in mind this provision

when it recognized that some of the Indians might have been using some of the waters on the Flathead Indian Reservation, when it said:

> "Sec. 19. That nothing in this act shall be construed to deprive any of said Indians, *** of the use of water appropriated and used by them for the necessary irrigation of their lands or for domestic use or any ditches, dams, flumes, reservoirs, constructed and used by them in the appropriation and use of said water."

This amendment was made in 1906, and Michel Pablo had built his ditch prior to 1891, and had used the water continuously in said ditch when the provisions of this amendment, opening the Reservation for allottment and sale, was passed by Congress.

It is idle now to say that the Indians on the Flathead Indian Reservation did not have the right to the use of water for the irrigation of their lands, and that no Indian had the right to appropriate any water for this purpose.

Plaintiff has upon her lands, a ditch dug by Michel Pablo, an Indian, some time prior to 1891, through which he was carrying water to the lands in his possession, and using the same for irrigation purposes.

The Court found that this use, for a beneficial purpose, should not exceed one inch to the acre, and that plaintiff was the owner of the right to the beneficial use of the water by reason of this appropriation.

Plaintiff should not be deprived of the use of said ditch and the water flowing therein under the provi-

sions of said Act, approved April 23, 1904, as amended by said Sec. 19.

Defendants *claimed* the *ownership of some* right so that these waters could be used by them.

The United States of America, Harold L. Ickes, Secretary of Interior, Henry Gerharz, Project Manager of the Flathead Irrigation Project, Flathead Irrigation District, and 37 others were made defendants in this action in order that if they had any right to the use of the waters of Mud Creek for a beneficial purpose, such right could be fixed, established and determined, and the waters divided between those entitled thereto.

Two of the defendants, only, showed any rights to the beneficial use of said water.

Defendants other than these two, made no answer, by which any water of Mud Creek could be given to them.

It was said in the North Side Canal Company vs. Twin Falls Canal Company, 12 F. (2d) 311:

> "Suit to establish right to the use of water as prior appropriator, in so far as determination of amount of water each appropriator is entitled to, is one for partition, within Judicial Code, 24 (Comp. St. 991 subd. 25) notwithstanding determination of rights of party to priority is in nature of suit to quiet title."

Title 28, Sec. 118 of U.S.C.A. provides that:

> "When in any suit commenced in any District Court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the District where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found with-

in the said district, or shall not voluntarily appear thereto, it shall be lawful for the Court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found ***."

Under this Section, said Title 28, in Note 41, on page 157, we find the statement:

"A suit for partition of land comes within the class of cases specified in this section." Greeley vs. Lowe, 15 Sup. Ct. Rep. 24.

"A suit for partition is a local action, within this section, and in which any question between any of the parties, plaintiffs or defendants, affecting their rights or interests in the land may be put in issue and determined." German Savings Soc. vs. Tull 136 F 1.

RIGHTS SETTLED IN ONE ACTION

Sec. 1705 R. C. of Mont. 1935, provides:

In any action hereafter commenced for the protection of rights acquired to water under the laws of this State, the plaintiff may make any and all persons who have diverted water from the same stream or source, parties to such action, and the Court may in one Judgment settle the relative priorities and rights of all parties to such action.

Turning to the Brief of Appellant's, Flathead Irrigation District, we find the statement on page 5:

"THE ONLY QUESTION WHICH THIS APPELLANT SEEKS TO REVIEW IS WHETHER THE PLAINTIFF AND DEFENDANTS, PABLO AND STERLING, ARE ENTITLED TO WATER FROM MUD CREEK ASIDE

FROM THE RIGHTS OF THE FLATHEAD IRRIGATION PROJECT AND IF SO, THE NATURE OF THESE RIGHTS."

This statement is made again on page 13 of said Brief.

Said Brief also states that it has never been possible to create water rights with a date of priority on the Flathead Indian Reservation under the doctrine of prior appropriation.

This being true, the allegations made by defendant Henry Gerharz, Project Engineer of the Flathead Irrigation Project, in the fourth affirmative defense (R 100), and the allegations in the answer of nineteen Indians, members of the Flathead Tribe of Indians, in the fourth affirmative defense, are not true (R 116) and the Act of the Secretary of Interior, on November 25, 1921 (R 115) was without authority in granting valid and subsisting water rights from Mud Creek and its tributaries to the lands of the following defendants (R 115-116). Eleven (11) defendants are given water rights (R 116).

Evidently counsel for the Flathead Irrigation District do not agree with the counsel representing the other defendants (except Alex Pablo and A. M. Sterling), and all steps taken by the Secretary of Interior in order to comply with the provisions of the Acts of Congress of June 21, 1906, the saving clause, and of May 29, 1908 (R 115), were void and of no effect, and the order, made on November 25, 1921, where eleven defendants, out of nineteen answering defendants, were

given certain water rights (R 116), has no binding force or effect. (A conclusion with which we hardly agree, in the main.)

The Secretary of Interior could not take away from the Indians any vested rights. The giving of *acre-feet* was not authorized by any law in the State of Montana. *Acre-feet* has nothing to do with the corpus of the water. In Montana, and in the Acts of authorizing the reclamation of lands, "beneficial use is but the basis, the measure and the limit of the right," and in all these cases (R 116) the Indians mentioned would have a right to sufficient water to irrigate their lands, beneficial use being the measure of right. U.S. vs. Hibner, at page 912.

The argument on page 31 of said Brief, states:

> "It is clear from this Act that Congress intended that the rule of equality should govern on reservations, and for the purpose of providing equality, the Secretary was authorized to make rules and regulations."

This being true, the Secretary of Interior, in attempting to fix and determine the private water rights on the Flathead Indian Reservation, wherein it was found that a large number of Indians on many different streams on said reservation were entitled to different amounts of water, was without authority to so hold, and it was contrary to the intent of Congress.

On page 12 of said Brief, the admission is made that the records show certain acts of the Secretary of Interior recognizing private water rights on the reservation.

If there are private water rights on the reservation,

the private water rights of plaintiff and the private water rights of two of the answering defendants are just as sacred as others, and there is no need of pursuing this question further.

The private water rights of others which counsel recognized, is because some rights were obtained, and had become vested prior to the passage of the Act of April 23, 1904, and its amendments, opening said reservation to allotment and sale of the unallotted lands.

Again in said Brief, the statement was made:

> "THE RESERVATION WAS FOR THE BENEFIT OF THE INDIANS AS A TRIBE AND NOT AS INDIVIDUALS."

Turning to the Treaty made the 16th day of July, 1855, we find that it recognizes that some of these Indians may have made:

> "substantial improvements heretofore such as fields enclosed and cultivated, and houses erected upon the lands hereby ceded, and which he may be compelled to abandon in consequence of this Treaty."

Such improvement shall be valued under the direction of the President of the United States, and

> "payment made therefor in money, or improvements of an equal value be made for said Indians upon the reservation: and no Indian shall be required to abandon the improvements aforesaid, now occupied by him, until their value in money or improvements of an equal value shall be furnished him as aforesaid."

This is part of Article II.

Article IV of said Treaty provides for the payment of money for certain years,

> "To be expended under the direction of the President in providing for their removal to the reservation, plowing up and fencing farms, building houses for them, and for such other objects as he may deem necessary."

Article V provides for the education of the Indian and furnishing them instructors in agricultural pursuits .

The plaintiff's Complaint alleges (R 74):

> "The Indians of said Confederated Tribe were encouraged to abandon their habits as a nomadic and uncivilized people and become a self-supporting agricultural and civilized people with permanent homes on lands thereafterwards to be allotted to them in severalty."

This allegation was admitted in the Answer of defendant Henry Gerharz (R 26) to the original Complaint filed.

It was also admitted in the Answer to the Amended Complaint filed by this defendant (R 90).

The Answer filed on behalf of the United States of America (R 23-24), admits nothing, and alleges nothing by which it might have any affirmative relief. Its Answer to the Amended Bill of Complaint (R 87-88) is the same.

The Answer of the nineteen Indians *admits* the said allegations contained in said Amended Complaint (R 106).

The Answer of defendant Flathead Irrigation District in effect denies this allegation.

HISTORY OF THE CONFEDERATED TRIBE OF INDIANS.

It must be born in mind that the Flathead Tribe, Kootenay Tribe and Upper Pend d'Oreilles constituted three separate tribes, and by the Treaty was known as the Flathead Nation.

The Flathead Tribe only was occupying the Bitter Root Valley and one of the objections that Chief Victor had was that he did not wish his people to be mixed up with the other tribes, and for this reason the provisions of the Treaty were made as to their remaining in the Bitter Root Valley.

These Indians in the Bitter Root Valley were many of them farmers, and in order to induce them to leave the Bitter Root Valley, and settle upon the Flathead Indian Reservation, Article XI was made a part of the agreement, and if,

> "in the judgment of the President, the Bitter Root Valley shall prove to be better adapted to the wants of the Flathead Tribe, than the General Reservation, then such portions of it as may be necessary shall be set apart as a separate Reservation for the said tribe."

Following this was the Garfield Agreement, found in Report of Commissioner of Indian Affairs, 1872, issued by Department of Interior, and the Act of June 5, 1872 (17 Stat., 226) opening the lands in the Bitter Root Valley for sale.

The Agent of the Flathead Agency on August 5, 1893, made a report which he designates as his Seventeenth Annual Report, and among other things said:

> "Nearly every head of a family on this reservation occupied definite, separate, though unallotted tracts, and their fences and boundary marks are generally respected. They live in houses, and a majority of their homes present a thrifty, farmlike appearance."

This report is plaintiff's Exhibit II in the case of J. C. Moody, etc., Appellant, Harry C. Smith, Appellee, Case No. 6784, (R 218 in said case) and we ask, that, as a Public Document, it be considered in this case.

In this case, prior to 1891, the witness, John Ashley (R 239), testified about the condition of the lands now owned by plaintiff, and in 1907 the witness, Jean McIntire, tells about this land of plaintiff being a show place on the reservation. There was a wonderful crop on the land of alsack and timothy (R 243).

This land was all fenced by Michel Pablo.

Can it now be said that these Indians had no right to occupy the lands fenced and cultivated by them, and water appropriated by them through ditches built at great expense, did not give them any vested rights? Under the doctrine of relations, the rights to the use of this water, the right to the use of these lands fenced and occupied, and the right to the homes built upon this land, would all take effect as of the date when first built.

As to the claims made on behalf of the Flathead Irrigation District, that the United States was the owner of the land and water on the Flathead Indian Reserva-

tion, we most respectfully call attention to the Act of April 23, 1904.

First we find Sec. 2 provides: "That so soon as all of the lands embraced within said Flathead Indian Reservation shall have been surveyed, the Commissioner of Indian Affairs shall cause allottments of the same to be made to all persons having tribal rights with said confederated tribes of Flatheads, Kootenays, Upper Pend d'Oreilles, and such other Indians and persons holding tribal relations as may rightfully belong on said Flathead Indian Reservation, including the Lower Pend d'Oreille or Kalispell Indians now on the reservation, under the provisions of the allotment laws of the United States."

Then follows the disposal under the general provisions of the Homestead and other laws of the unallotted lands.

Then follows how the land shall be opened to settlement, the allotted lands being only a small part of the Flathead Indian Reservation.

Then follows who shall be entitled to enter these lands, and how the payments shall be made. The right is given to commute entries under the Homestead Law. Much land was given to the various organizations theretofore established on the Reservation.

At the end of five years, should there be any remaining and undisposed lands, they were to be sold at public auction.

Then follows provisions for the payment of lands

reserved, and then follows Section 16, which is as follows:

> "Sec. 16. That nothing in this act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six, or the equivalent, in each township, and the reserved tracts, mentioned in section twelve, or to dispose of said lands except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received."

Many amendments were thereafter made and as stated June 21, 1906, Sec. 17, 18, 19 and 20 were added, Sec. 19 containing provisions to the effect that nothing in the Act should be construed to deprive any of said Indians of the use of water appropriated and used by them for the necessary irrigation of their lands.

This provision is meaningless and of no effect, according to the Brief of the Flathead Irrigation District.

The lands of plaintiff were settled upon prior to 1891, and an allottment was approved to plaintiff's predecessors in 1908. The ditch was there and water was flowing in it, and had been flowing in it since prior to *1891.*

August 26, *1926,* the Flathead Irrigation District was organized. No ditch was ever dug to the lands of plaintiff and no water ever furnished her by the Flathead Irrigation Dsitrict. In no way were any of her

rights purchased, and yet without the payment of any sum and without the purchase of anything, this defendant now claims to have the right to the use of this water flowing in Mud Creek to the exclusion of plaintiff and claims that the Flathead Irrigation Project has a right to maintain a dam in Mud Creek so that this defendant may store water in the Pablo reservoir at all times, and entirely deprive this plaintiff of any such water, at times when she needs it and can use it for a beneficial purpose.

In the answer of defendant Henry Gerharz, Project Engineer of the Flathead Irrigation Project, in his fifth affirmative defense, the claim is made that the United States, through its Supervising Engineer of the Flathead Reclamation Project, duly authorized by the Secretary of Interior, in that behalf, to make the following appropriation of the waters of Mud Creek and its tributaries.

Then follows seven different appropriations of the waters of Mud Creek, running from 20 cubic feet per second of time to 200 cubic feet of water per second of time, five dated January 28, 1910, one dated April 4, 1913, and one April 7, 1913, and the book and page where recorded is given, in Flathead County and in Missoula County (R 102).

These appropriations made by the United States were made under the statute of 1905 (Laws of 1905, Ch. 44) which provides:

> "When the government of the United States desires to acquire the right to the use of waters flow-

> ing in natural streams in Montana, it must proceed as an individual to make an appropriation in compliance with the laws of the state. See Mettler vs. Ames Realty Co., 61 Mont. 152."

In making these appropriations, the United States does so as an individual, and not as a sovereign, and it can be joined in suits to adjudicate the water appropriated the same as any other party, and the claim made by counsel, in the Brief of Appellant, Flathead Irrigation District on page 21:

> "WE DO NOT CONTEND THAT THE UNITED STATES, AS A SOVEREIGN, HELD UNTO ITSELF THIS TITLE, BUT WE DO CLAIM THAT THE UNITED STATES, AS GUARDIAN OF THE INDIANS, HELD THIS TITLE AFTER THE EXECUTION OF THE TREATY."

may be correct, but in such a case, it is not immune from suit.

As to the Brief filed on behalf of the United States of America and other defendants, we find quite a number of apparent errors.

First, eighteen parties named in the Complaint filed *no* answer, and are *not* represented in this appeal.

It would appear in this regard that nineteen individual Indians are claiming some priorities to the waters of Mud Creek, and that eighteen defendants named are not claiming anything.

As to them, their default was duly entered prior to the trial of this action.

On page 12 and page 13 of said Brief, five questions were presented.

Answering the first question:

Many cases hold with the North Side Canal Company vs. Twin Falls Canal Company, set forth on page 9, supra:

> "Suits to establish right to the use of water as prior appropriators, in so far as determination of amount of water each appropriator is entitled to, is one for partition."

In Frost, et al, vs. Alturas Water Company, 81 Pac. 996, the Court said:

> "It is claimed that these provisions are sufficiently broad to cover a case of joinder such as the one under consideration. It has been frequently held that the appropriators and users of water from the same stream where each owned his separate land and right, could not join in an action against other appropriators and users of water from the same stream for the recovery of damages for an obstruction of their rights or an unlawful diversion of the water to their damage or prejudice; and it has been held by the same authorities that such parties had sufficient common interest that would justify them in uniting as joint plaintiffs in a suit to enjoin a continuation and repetition of such unlawful acts. Churchill v. Lauer (Cal.) 24 Pac. 107; Ronnow v. Delmue (Nev.) 41 Pac. 1074; Foreman v. Boyle (Cal.) 26 Pac. 94; Blaisdell v. Stephens, 14 Nev. 17, 33 Am. Rep. 523; Miller v. Highland Ditch Co. (Cal.) 25 Pac. 550; Bliss on Code Pleading, 76; Kinney on Irrigation 327. See also Kennedy v. Scovil, 12 Conn. 317; May v. Parker, 12 Pick. (Mass.) 34, 22 Am. Dec. 393. The principle upon which these two distinct holdings is based seems to us clear and obvious. Farnam on Water and Water Rights, vol. 3 687b says: "The relation of prior and subsequent appropriators of the waters of a stream is

> that of *tenants in common,* the respective rights of whom a court of equity has the power to ascertain and determine, and to fix the times at which each may have the use of the water." This text appears to find support in Becker v. Marble Creek Irrigation Company (Utah) 49 Pac. 892; Frey v. Lowden (Cal.) 11 Pac. 838."

In the case of Becker vs. Marble Creek Irrigation Company, supra, at page 893, the Court said:

> "Their relation to each other would be that of tenants in common respecting the waters of the stream, and a Court of Equity has power to ascertain and determine their respective rights as to the waters therein flowing. Irrigation Company vs. Moyle 4 (Utah) 327, 9 Pac. 867; Frey vs. Lowden 70 (Cal.) 55, 11 Pac. 838; Combs vs. Slayton 19 (Or.) 99, 26 Pac. 661."

In the case of Frey et al., vs. Lowden et al., supra, the Court said:

> "Both plaintiffs and defendants derived their rights from appropriation under the statute law of the state, and, under the law, they, in the enjoyment of that right, became and were, tenants in common in the use of the flow of the stream, and entitled to appropriate from it, to the extent of their rights, in the order of time at which they had been acquired."

Section 7105, R. C. of Mont. 1935 provides that water rights be settled in one action, and the making of all persons, who have diverted waters from the same stream or source, parties to such action.

Undoubtedly all of the parties using water out of Mud Creek are joint tenants, and one action such as this can be brought, making all parties in such action. If the United States is claiming rights as a sovereign,

it can be made a defendant under Sec. 24 of the Judicial Code, supra, and if it is claiming as an individual, under certain appropriations made (R 102), then it is a proper party defendant, without reference to said Act of Congress, consenting to be sued, where the United States is a joint tenant.

Answering the second question:

It would appear that the United States is *not* an indispensible party to this action, if it does not claim, under the appropriations made, as set forth on page 102 of the Record.

See Ickes, Secretary of Interior, vs. Fox, et al., set forth on page 7 of this Brief.

Also see United States vs. Power, 94 F (2d) 783.

Answering the third question:

Private water rights have been recognized throughout the Flathead Reservation to various Indians who had acquired vested rights to the use of water prior to the opening of said reservation to allottment and sale.

Answering the fourth question:

Without dispute, the evidence discloses that the ditch by which the appropriation was made was of sufficient carrying capacity to carry the water appropriated and that said water was used for a beneficial purpose.

Answering the fifth question:

Sec. 7094, R. C. of Mont. 1935 states:

"APPROPRIATION MUST BE FOR A USEFUL PURPOSE—ABANDONMENT.

> The appropriation must be for some useful or beneficial purpose, and when the appropriator or

his successor in interest abandons and ceases to use the water for such purpose, the right ceases; but questions of abandonment shall be questions of fact, and shall be determined as other questions of fact."

"ESSENTIAL OF ABANDONMENT

Abandonment of a water right is a voluntary act, and to constitute it there must be a concurrence of act and intent—the relinquishment of possession and the intent not to resume it for a beneficial use—neither alone being sufficient to bring about its abandonment."

Thomas, et al., v. Ball et al., 66 M 161, 166, 213 P. 597.

"NO LAND QUALIFICATIONS NECESSARY FOR APPROPRIATION.

An appropriator of water need not be either an owner or in possession of land to make a valid appropriation for irrigation purposes.
Toohey vs. Campbell, 24 M 13, 17, 60 P 396.
Smith v. Denniff, 24 M 20, 27, 60 P 398.
Bailey v. Tintinger, 45 M 154, 175, 122 P 575."

In discussing this case, it must be remembered that the Act of May 29, 1908 (35 Stat., 448) was passed for the purpose of giving water to the various homesteaders and purchasers of unallotted land and provisions were made whereby the entryman of lands to be irrigated might pay for the construction, operation and maintenance of ditches used in a system of irrigation, and such water rights were to be *free to Indians,* the Indian to pay only for operation and maintenance.

The waters of Mud Creek were carried in the Pablo Feeder Canal to the Pablo Reservoir and a *large majority* of the lands to be irrigated out of this reservoir

were never allotted to Indians, but were sold under the Act opening said Reservation, and have no water rights except the surplus water after the Indian allottee is fully satisfied (R 328-239-330).

> "The land was settled up with a lot of dry land farmers." (R 329).

The Decree in this case (R 225), enjoins the Project Manager from interfering with the rights of the plaintiff, and from damming up or maintaining any dam on Mud Creek so that said water be diverted or turned from the main channel of Mud Creek in a way that those who have established their water rights would be deprived of the water necessary and required for the proper irrigation of their lands, which water is the private property of said parties, and appurtenant to their lands.

We respectfully submit that the judgment appealed from should be affirmed.

Respectfully submitted,
ELMER E. HERSHEY,
Missoula, Montana,
Attorney for Plaintiff and
Appellee, Agnes McIntire.